Act, 1954. But if they agree upon a tenancy and so express it, he is protected."

The sad fact, however, in this case is that the agreement did not match the high standard of draftsmanship in the *Shell-Mex's* case. It is not as clear cut or as unequivocably stated, save that in Clause 5, *supra*, it was expressed to be a licence. Terms are used and provisions have been made as in a tenancy. But in our judgment, it is reasonably clear that what was given in the document was a licence. The appellant had not given up the ground floor to the respondent for him to use as he liked. The exclusive possession that appeared to have been given was only as to the physical part of the user. The ground floor was to continue to be used as an eating-shop and no other, the licence was to remain and to be renewed in the name of the appellant except that the respondent or his nominee might be named as the manager or person in charge of the business and have his photo affixed to the relevant document. The appellant was to carry out all minor and major repairs and painting or white washing as might be required which though not expressly stated, must reasonably be as required by the City Council Authorities for the purpose of the eating-house business. In the circumstances, the dominant intention of the parties is, in our view, to give a licence to run the appellant's business of an eating-house as the respondent's own for the term with necessarily the use of the ground floor for this purpose. Clause 5 becomes decisive of the special relationship between the parties and the *habendum* must be seen to be an error of drafting.

Into this category of mistake must be placed the unfortunate exercise which the appellant's then solicitors carried out in distraining on the respondent's goods for arrears of rent. Distress is only available to a landlord against a tenant and in the circumstances of the case wrongful but we do not think it quite correct to contend that the distress levied would have converted what was in our view clearly a licence into a tenancy.

In our view, it is not really necessary to say that such a licence is not "contracting out of the statute" which as has been held in *Rajenback* v. *Mamon*,[21] and in a number of local cases which have followed this accepted authority, a landlord should be prevented from exploiting. It is not a case of any promise extracted by someone with superior bargaining power that the tenant will give up a protected tenancy at the end of the term or that he will not rely on the protective provisions of the law; *Johnson & Anor.* v. *Moreton*.[22] It is the case of parties agreeing to a transaction which from its inception lies outside the purview of the relevant Ordinance. The legislation protects a tenancy but not a licence. As Geoffrey Lane L.J. in *Aldrington Garages* v. *Fielder*[23]: "If there was here only a licence and not a tenancy dressed up in the verbiage and trappings of a licence, the landlord was entitled to succeed." See also the passage cited earlier from Lord Denning M.R. in *Shell-Mex's* case.

For these reasons we allow the appeal with costs here and in the court below. The respondent's claim stands dismissed and there will be judgment on the counterclaim in favour of the appellant. The amount, as we understand, has been agreed. The respondent will give up possession within two months from the date of this judgment. In the event there are any loose ends to be tied up, there shall be liberty to apply to the High Court.

Appeal allowed.

Solicitors: *Allen & Gledhill; Sharma & Co.*

PUBLIC PROSECUTOR v. ISMAIL BIN YUSOF

[F.C. (Suffian L.P., Raja Azlan Shah, Wan Suleiman, Chang Min Tat & Syed Othman F.JJ.)
January 8 & February 13, 1979]

[Kuala Lumpur — Federal Court Criminal Reference No. 1 of 1977]

Criminal Law and Procedure — Charge of operating a prohibited fishing gear, namely pukat rawa with fishing vessel — Whether fishing vessel liable to seizure — Whether court bound to make order of forfeiture of vessel — Fisheries (Prohibition of Method of Fishing) Regulations, 1971, s. 2 and Schedule — Fisheries Act, 1963, ss. 14, 15 and 23.

Fisheries — Charge of operating a prohibited fishing gear, namely pukat rawa with fishing vessel — Seizure of vessel — Forfeiture — Fisheries (Prohibition of Method of Fishing) Regulations, 1971, r. 2 — Fisheries Act, 1963, ss. 14, 15 and 23.

Precedent — Whether Federal Court bound by previous decision — Federal Court in error.

In this case a Deputy Maritime Fishery Officer while on patrol found the respondent fishing with a pukat rawa from a fishing vessel off Sungei Buloh in Kuala Selangor. He seized the vessel and brought it to port. The respondent subsequently pleaded guilty to charges of being found operating a prohibited fishing gear with the fishing vessel and of using the fishing vessel without carrying the vessel's licence on board. He was fined $270/- and the learned Magistrate ordered the forfeiture of the pukat rawa but ordered the release of the vessel to the respondent. On appeal by the Public Prosecutor, the High Court upheld the order releasing the vessel. On application by the Public Prosecutor the learned judge reserved the following questions of public interest for the decision of the Federal Court (1) whether the boat referred to in the Schedule to the Fisheries (Prohibition of Method of Fishing) Regulations, 1971, is liable to seizure under section 14 of the Fisheries Act, 1963, when the fishing net is used contrary to the regulations; (2) whether the court under section 15(1) of the Fisheries Act, 1963, is bound to make an order for the forfeiture of the boat seized under section 14(1) of the said Act when it is proved to its satisfaction that an offence under section 13(1) of the said Act was committed for using for the purpose of fishing a pukat rawa contrary to the Fisheries (Prohibition of Method of Fishing) Regulations, 1971.

Held: (1) the boat referred to in the Schedule to the Fisheries (Prohibition of Method of Fishing) Regulations, 1971, is liable to seizure under section 14(1) of the Fisheries Act, 1963 because the Fisheries Officer had reason to believe that an offence had been committed contrary to the regulations;

(2) when it is proved to the court's satisfaction that an offence under section 13(1) of the Act has been committed of using a net prohibited by the regulations and the boat was used in the commission of the offence, the court is bound under section 15(1) of the Act to make an order for the forfeiture of the boat;

(3) as the use of the prohibited pukat rawa is an offence only if accompanied by its use with a boat propelled by an engine, the boat was a vessel in respect of which the Fisheries Officer had reason to believe that an offence had been committed contrary to the regulations within section 14 of the Act and so was liable to seizure and forfeiture by the court.

Cases referred to:-

(1) *Ong See Ke* v. *Public Prosecutor* [1976] 2 M.L.J. 145.
(2) *Juk de Sa* v. *Public Prosecutor* [1975] 1 M.L.J. 283.
(3) *Public Prosecutor* v. *Lee Chin Chai* [1974] 2 M.L.J. 174.

FEDERAL COURT.

Sharkawi bin Alis (Deputy Public Prosecutor) for the appellant.

Radzi Sheikh Ahmad for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): On September 10, 1976, Deputy Maritime Fishery Officer Quek, while on patrol, found the respondent fishing with a *pukat rawa* from Fishing Vessel PKF 4457 off Sungei Buloh in the District of Kuala Selangor. He seized the vessel and brought it to port with the respondent.

On September 20, 1976, the respondent was charged before the Kuala Selangor Magistrate with committing two offences, viz.:

"*First Charge*

That you on September 10, 1976 at 11.50 p.m. at sea half a mile off Sungei Buloh in the District of Kuala Selangor in the State of Selangor was found operating a prohibited fishing gear, namely 'pukat rawa' with fishing vessel bearing registration number PKF 4457, thereby committing an offence under Fisheries (Prohibition of Method of Fishing) Regulations, 1971, and punishable under section 13(1) of the Fisheries Act No. 8 of 1963.

Second Charge

That you on September 10, 1976 at 11.50 p.m. at sea half a mile off Sungei Buloh in the District of Kuala Selangor in the State of Selangor was found using as fishing vessel bearing registration number PKF 4457 without carrying the vessel's licence on board the vessel as required under section 481 of the Merchant Shipping Ordinance No. 70 of 1952 and thereby committed an offence under the same section and punishable under section 484 of Merchant Shipping Ordinance No. 70 of 1952."

He pleaded guilty to both charges and was fined $270. The Magistrate ordered the forfeiture of the *pukat rawa* but ordered the release of the vessel to the respondent. On appeal by the Public Prosecutor, the High Court upheld the order releasing the vessel to the respondent.

On application by the Public Prosecutor the learned judge reserved for the decision of this court under section 66(1) of the Courts of Judicature Act No. 7 of 1974 the following questions of law of public interest:

(1) whether the boat referred to in the Schedule to the Fisheries (Prohibition of Method of Fishing) Regulations, 1971, is liable to seizure under section 14(1) of the Fisheries Act, 1963, when the fishing net is used contrary to the aforesaid regulations;

(2) whether the court under section 15(1) of the Fisheries Act, 1963, is bound to make an order for the forfeiture of the boat under section 14(1) of the said Act when it is proved to its satisfaction that an offence under section 13(1) of the said Act was committed of using for the purpose of fishing a *pukat rawa* contrary to the Fisheries (Prohibition of Method of Fishing) Regulations, 1971.

Section 2 of the Fisheries (Prohibition of Method of Fishing) Regulations, 1971, published as PU(A) 187 of 1971, provides:

"No person shall use for the purpose of fishing or have in his possession *on board any vessel*, any fishing net or trap described in the Schedule hereto."

The Schedule gives a description into which falls the *pukat rawa* in question and reads as follows:

"Any fishing net, used *with boat propelled by engine*, called by whatever name which consists of a triangular net supported between two poles which are crossed and secured some distance from the top and each of them tapers from this point to end in a ski-shaped shoe, being of a kind normally operated by pushing or thrusting the gear along the seabed before raising."

Section 13(1) of the Fisheries Act under which the first charge was framed provides as follows:

"(1) Any person who does ... an act contrary to ... the provisions of this Act or any regulations made thereunder shall be guilty of an offence ..."

Section 14(1) and (3) of the Fisheries Act provides:

"(1) All vessels ... nets ... *in respect of which any Fisheries Officer* [which includes Mr. Quek] ... *has reason to believe that an offence has been committed* contrary to the provisions of this Act or any regulations ... made thereunder may be seized by such officer without warrant.

(3) All things liable to seizure under this section ... shall be liable to forfeiture."

"Vessel" is defined by section 23 as including "any ship or boat or any other description of *vessel used for fishing*".

Section 15(1) provides:

"(1) An order for the forfeiture or release of anything liable to forfeiture under this Act shall be made by the court before which the prosecution with regard thereto has been held and an order for the forfeiture of such thing shall be made if it is proved to the satisfaction of the court that

(a) the offence committed is for —
  (i) using any net, instrument, fishing material or appliance which is prohibited under this Act or any regulations ... made thereunder; or
  (ii) ...; and
(b) that thing was *the subject matter of or was used in the commission of the offence* notwithstanding that no person may have been convicted of such offence."

It will be noted that there are two limbs to section 15(1). As stated by Hashim Yeop A. Sani J. at page 147 in *Ong See Ke* v. *Public Prosecutor*[1] —

"The first limb of section 15(1) requires that an order for the forfeiture or for the release of anything liable to forfeiture under the Act shall be made by the court before which the prosecution with regard thereto has been held. The second limb of that subsection requires that an order for forfeiture shall be made if it is proved to the satisfaction of the court that either paragraphs (a)(i) and (b) *or* paragraphs (a)(ii) and (b) have been complied with."

In this case it is the second limb that is relevant.

The answers to the questions reserved for our decision depend on the answers to the following questions.

Was the vessel a thing in respect of which Mr. Quek had reason to believe that an offence had been committed contrary to the regulations? If so, it could have been seized by Mr. Quek without warrant, i.e., it was liable to seizure. For the reason to be indicated below, we are of the view that it could and was therefore liable to seizure by Mr. Quek.

Was it proved to the satisfaction of the court that:
(a) the offence committed by the respondent was for using a net prohibited by the regulations; and
(b) the vessel was the subject matter of the offence or was used in the commission of the offence?

If it was, then the court had no alternative but must under section 15(1) order its forfeiture.

We are of the opinion that both conditions had been satisfied and that therefore the mandatory order should have been made. First, undoubtedly the respondent had used a net prohibited by the regulations. Secondly, even if the boat was not the subject matter of the offence and only the net was, there is no doubt that it (the boat) was used in the commission of the offence of using for the purpose of fishing a net described in the schedule, a net totally prohibited by law. The vessel was in the same position as a parang used by a killer. The parang was not the subject matter of the offence, but it certainly was a thing used in the commission of the offence of killing.

Moreover, the words "used with boat propelled by engine" in the description of *pukat rawa* in the schedule to the regulations clearly envisages its use *with* a boat, unlike say a *jala* which may or may not be used with a boat. What the regulations prohibit is the use for the purpose of fishing of this kind of net if and only if used with a boat propelled by an engine. They do not prohibit its use without a boat or with a boat without an engine. Thus, the use of an engined boat is a *necessary* ingredient of the offence, or to adopt the expression used by Abdul Razak J. at page 283 in *Juk de Sa* v. *Public Prosecutor*[2] an "inseparable part" or an "indispensable part" of the operation of the *pukat*, and to adopt the expression used by Hashim Yeop A. Sani J. at page 148 in *Ong See Ke* v. *Public Prosecutor*[1] such use was "concomitant" with such operation, though the charges in these two cases were under different provisions of the law. We agree with these two decisions.

Applying the same line of reasoning, it would therefore appear that we were in error in *Public Prosecutor* v. *Lee Chin Chai*.[3] There the accused was convicted of a charge of having in his possession on board a vessel a fishing appliance without a licence, an offence contrary to regulation 3(b) of the Fisheries (Maritime) Regulations, 1967, P.U. 49 of 1967, and it was held that only the fishing appliance could be the subject matter of the offence and the vessel in which it was found was not included and therefore it was not mandatory for the court to order its forfeiture. Regulation 3(b) provides:

"No person shall —
(b) have in his possession *on board a vessel* any fishing appliances . . . ;
unless there is in force in respect of such . . . appliances a licence or permit."

Because of the words italicised, in our view, you do not require a licence to possess a fishing appliance in a shop, a house, a car or on the beach. You require one if it is on board a vessel used for fishing like the one in that case. Thus the use of a vessel is an essential ingredient of the offence of possession of a fishing appliance without a licence and so if you commit this offence, the vessel is necessarily used in the commission of the offence.

Returning to the instant case, as the use of the prohibited *pukat rawa* is an offence only if accompanied by its use with a boat propelled by an engine, this boat is, in our judgment, a "vessel in respect of which a Fisheries Officer had reason to believe that an offence had been committed contrary to the regulations" within section 14(1) and that is why we think that it was liable to forfeiture.

In our judgment, the answers to the questions put to us are as follows:

(1) The boat referred to in the Schedule to the Fisheries (Prohibition of Method of Fishing) Regulations, 1971, is liable to seizure under section 14(1) of the Fisheries Act, 1963, because the Fisheries Officer had reason to believe that an offence had been committed contrary to the regulations.

(2) When it is proved to the court's satisfaction that an offence under section 13(1) of the Act has been committed of using a net prohibited by the regulations and the boat was used in the commission of the offence, the court is bound under section 15(1) to make an order for the forfeiture of the boat.

We make no order regarding this boat, as we understand that all that is required of us is to give a ruling to govern pending and future cases.

Questions answered.

Solicitors: *Radzi Sheikh Ahmad & Partners.*

UNITED HOKKIEN CEMETRIES, PENANG v. THE BOARD, MAJLIS PERBANDARAN PULAU PINANG

[F.C. (Raja Azlan Shah, Chang Min Tat & Syed Othman F.JJ.) December 7, 1978 & February 16, 1979]

[Penang — Federal Court Civil Appeal No. 133 of 1978]

Local Government — Rates — Exemption of building used exclusively for religious worship — Whether a columbarium a place used for religious worship — Whether columbarium a burial ground — Municipal Ordinance, (S.S. Cap. 133), s. 59(5) — Local Government Act, 1976, s. 134.

Interpretation of Statutes — Literal interpretation — Interpretation to promote the general legislative purpose.

Administrative Law — Discretion — When High Court can overrule exercise of discretion — Refusal to exercise discretion based on wrong interpretation of law.

In this case the respondent had served a notice of a proposed amendment of assessment on a property described as a columbarium. The land on which the columbarium was erected was a cemetery for members of the Hokkien community in Penang. A crematorium had also been erected on the land. Both the cemetery grounds and the crematorium had been exempted from assessment. But in respect of the columbarium, the respondent turned down the objection of the appellant as did the High Court on appeal therefrom. The appellant appealed to the Federal Court.

Held, allowing the appeal; (1) the keeping of urns containing the cremated ashes of the dead as a form of honour or regard for the mortal remains of the dead was a form of religious worship;